

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA  
SOUTHERN DIVISION

In re PHILIP E. SMITH,	) BK CASE 01-0356-DHW
	) Chapter 7
Debtor.	)
	) ADV. PRO. NO. 01-0084-DHW
	)
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	)
PHILIP E. SMITH,	)
	)
Appellant,	)
	)
v.	) <b>CASE NO. 1:02-CV-742-F</b>
	)
CARLA SMITH and STEVEN E. SMITH,	)
	)
Appellees.	)

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

Philip E. Smith, debtor and appellant (hereinafter “the appellant” or “the debtor”), appeals the Bankruptcy Court’s judgment in favor of Carla Smith and Steven E. Smith (hereinafter “the appellees”) holding certain debts non-dischargeable under 11 U.S.C. §523(a)(2). For the reasons stated below the judgment of the Bankruptcy Court is AFFIRMED.

**II. STANDARD OF REVIEW**

District courts function as an appellate courts in reviewing the bankruptcy courts’ decisions. *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir. 1990) (citing 28 U.S.C. §158(a), (c)). Accordingly this court will set aside the bankruptcy court’s findings of fact only for

clear error and will review conclusions of law *de novo*. *Id.* Because district courts lack the authority to make independent findings of fact when hearing an appeal from the bankruptcy court, this court must remand the case if the bankruptcy court's factual findings are silent or ambiguous at to an outcome determinative factual question. *Id.*

### **III. PROCEDURAL AND FACTUAL BACKGROUND**

The following facts are taken from the Bankruptcy Court's Memorandum Opinion dated April 2, 2002. The debtor was the principal owner of Smith Development and Construction, Inc. In 1997 the corporation began developing real property in Henry County, Alabama into a mobile home subdivision named Bradford Place. The subdivision was platted, and certain restrictions and covenants relating to the subdivision were recorded in the Probate Office of Henry County, Alabama on September 25, 1997. The debtor marketed the lots in the southern section of the subdivision first, and intended to complete street paving and other improvements in the other sections of the subdivision in stages.

The debtor, on behalf of his corporation, negotiated with the appellees for sale of a lot in the subdivision, and in October of 1997 the appellees purchased the largest lot in Bradford Place for \$12,950. The appellees' lot was the second one sold in Bradford Place.

During the course of the negotiations, the Debtor made several representations to the appellees, two of which are relevant to this appeal. First, the debtor represented that all electricity would run underground, including the electricity running within the right-of-way. Second, the debtor represented that only double wide mobile homes, as opposed to single-

wide mobile homes, would be allowed within the subdivision. Neither of these representations appeared in the recorded restrictions and covenants. The appellees received a copy of the restrictions and covenants prior to purchase of their lot.

In January of 1998 the appellees placed a \$44,000 dollar double-wide mobile home on their lot, and made other improvements to the property in compliance with the covenants and restrictions. However, as more lots were sold the appellees became concerned that the assurances they received before they purchased their lot were not coming to pass. Among other things, they noticed that single-wide homes were placed on some lots and that the electrical wiring within the right of ways was overhead rather than underground.

During this time period, the financial condition of Smith Development and Construction, Inc. deteriorated. Lot sales did not go well, and the company had cash flow problems. The debtor obtained a second mortgage on Bradford Place and invested the additional capital into improvements, but nonetheless by the summer of 2000 the business had failed completely. Due in part to this situation, the value of the appellees' lot has dropped significantly from the purchase price.

The appellees filed an action in Circuit Court of Henry County, Alabama against the debtor among other defendants. The action against the debtor was stayed by the debtor's bankruptcy filing. On April 23, 2001 the appellees filed a Complaint to Determine Dischargeability of Debt in the Bankruptcy Court alleging that the debts that the debtor owes the appellees are non-dischargeable pursuant to 11 U.S.C. §523(a). On February 13, 2002

a trial was held before the honorable Judge Dwight H. Williams, United States Bankruptcy Judge. On April 2, 2002 the Bankruptcy Court entered a Memorandum Opinion making the above findings of fact. The Bankruptcy Court also concluded that the debtor's representations regarding underground wiring in the right of ways and exclusion of single-wide mobile homes both constituted non-dischargeable fraud under 11 U.S.C. §523(a)(2)(A). Accordingly, the Court entered a Final Judgment declaring that the appellant's debt to the appellees arising from appellant's fraudulent representations is non-dischargeable and terminating the automatic stay to permit liquidation in state court. On April 11, 2002 the debtor filed a Motion for Reconsideration and the Bankruptcy Court denied the same by Memorandum Opinion dated May 7, 2002. On May 28, 2002 the debtor filed the instant appeal.

#### **IV. DISCUSSION**

The appellant raises three issues on appeal: (1) whether the Bankruptcy court erred to reversal in concluding that the debtor in fact represented that electricity within the right-of-way would be underground and that at the time he made the representation he had a present intent to deceive; (2) whether the Bankruptcy court erred to reversal in concluding that the debtor represented that only double-wide trailers would be allowed in the subdivision and that at the time he made the representation, he had a present intent to deceive; and (3) whether the Bankruptcy Court erred to reversal in failing to adequately consider lack of privity of contract as a defense. The Court will address each issue in turn.

*A. Underground Electrical Wiring Within the Right-of-Ways*

In order to prevail in an action under 11 U.S.C. §523(a)(2), the appellants must prove the following elements: (1) that the debtor made a false representation to deceive the creditor; (2) that the creditor relied on the misrepresentation; (3) that the reliance was justified; (4) that the creditor sustained a loss as a result of the misrepresentation. *SEC v. Bilzerian*, 153 F.3d 1278, 1281 (11th Cir. 1998). Further, in regard to the first element, when fraudulent representation is predicated on a promise to perform or abstain from some act in the future, the creditor must show that at the time of the promise, the promisor had no intention of carrying out the promise, but rather had a present intent to deceive. *See Wade v. Chase Manhattan Mortgage Corp.*, 994 F. Supp. 1369, 1378 (N.D. Ala. 1997). The failure to perform alone is not enough evidence of present intent to deceive, rather there must be some other circumstantial or direct evidence upon which the court bases this finding. *See id.*

The Bankruptcy Court concluded as a matter of law that the debtor's alleged promise that all electrical wiring, including the wiring in the right-of-way, would be underground was a promise to do something in the future, and therefore the appellees had to show that the debtor had a present intent to deceive at the time of the promise. Reviewing this conclusion of law *de novo*, the Court agrees with this legal framework.

The Bankruptcy Court went on to find that at the time of negotiations, the debtor in fact made a representation to appellees that all electrical wiring would be underground, including the wiring in the right-of-ways, and that at the time he made this promise he had

a present intent to deceive the appellees. It is these factual findings that the appellant questions. Because findings of fact are at issue this Court will review for plain error.

The debtor testified that he never made such a promise to the appellees, while the appellees both testified that the promise was made. After a thorough review of the record, this Court finds that it was not clear error for the Bankruptcy Court to credit the appellees' testimony while discrediting the appellant's. The debtor also testified that he at no time intended to bury the wiring within the right of way. This testimony combined with the failure to perform is sufficient evidence of a present intent to deceive. As the fact finder, the Bankruptcy Court is entitled to credit some but not all testimony from a particular witness. After a careful review of the record, this Court finds no error in the Bankruptcy Court's choice to credit the debtor's testimony about his intentions in relation to wiring, while discrediting his testimony in regard to whether he misrepresented these intentions during negotiations with the appellees.

*B. Double-Wide Mobile Homes*

The Bankruptcy Court found as a matter of law that the debtor's alleged promise to allow only double-wide mobile homes in the subdivision constituted a representation of existing fact, rather than a promise to do something in the future. The appellant challenges this conclusion. Upon *de novo* review, this Court finds that the promise to allow only double-wide mobile homes is a promise to do something in the future, and therefore the Bankruptcy Court's legal conclusion is in error. However, because the Bankruptcy Court

nonetheless analyzed the double-wide promise under the same legal framework as outlined above, including the requirement of a present intent to deceive, the error is harmless.

The Bankruptcy Court made the following findings of fact in regard to the double-wide promise, all of which the appellant challenges. First, the debtor in fact made the representation to the appellees during negotiations that only double-wide mobile homes would be allowed in the subdivision. Second, this restriction was not included in the covenants and restrictions recorded in the Probate Office of Henry County, Alabama, and the Debtor was aware that no such restriction existed. Third, because the debtor was an experienced real estate developer, he was aware that without a recorded restriction, single-wide mobile homes could be brought into the subdivision at a later date. Therefore, the Bankruptcy Court concluded, the debtor made the promise with knowledge of its falsity and with the present intent to deceive.

After a thorough review of the record, this Court finds that none of these factual findings are clearly erroneous. Although the debtor testified that he did not make such a promise, the appellees testified that he did in fact make the representation, and another witness testified that the debtor had made the same representation to her during negotiations for purchase of a lot. It was certainly not plain error for the Bankruptcy Court to credit the testimony of these three witnesses over the testimony of the debtor. The contents of the recorded restrictions and covenants is not in dispute, and the debtor testified that he was aware of their contents. The debtor also testified that Bradford Place was not his first real

estate endeavor, and it is reasonable to infer that the debtor was aware that without a restriction running with the land, single-wide mobile homes could not be excluded from the subdivision. Accordingly, these factual findings along with the failure to perform are enough evidence upon which to conclude that the Debtor had a present intent to deceive when he made the representation concerning double-wide trailers and therefore there is no plain error.

*C. Privity of Contract*

The appellant argues that because the appellees signed a contract with Smith Construction & Development, Co, rather than the debtor individually, there is no privity of contract between appellees and the debtor, and consequently a fraud action cannot lie. Although the appellant failed to refer this Court to the record of the trial to show that this issue was properly raised, upon a review of the record, the Court acknowledges that this point was argued to the Bankruptcy Court, and some testimony was presented on the issue. However, the appellant has cited absolutely no legal authority in support of his position, and the Court has found none. Rather, it is clear that under Alabama Code §6-5-101 (1975), anyone who commits legal fraud is liable for the damages flowing from such fraud. *See Huntsville Dodge, Inc. v. Furnas*, 361 So.2d 585, 588 (Ala. Civ. App. 1978) (All persons are under a duty not to fraudulently misrepresent material facts to persons with whom they have business dealings). Accordingly, although the Bankruptcy Court did not address this point in its Memorandum Opinion, this Court finds no reversible error.



## **V. CONCLUSION**

For the foregoing reasons, the Final Judgment of the Bankruptcy Court dated April 2, 2002 is hereby AFFIRMED.

DONE this 13<sup>th</sup> day of August, 2004.

/s/ Mark E. Fuller  
CHIEF UNITED STATES DISTRICT JUDGE